Supreme Court, U.S.
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No. _____

In The
Supreme Court of The United States
October Term 1998

BRUCE JOHNSON,
Petitioner,

v.

GILA RIVER INDIAN COMMUNITY,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

RICHARD J. SUNDBERG*
11025 Irwin Avenue South
Bloomington, Minnesota 55437
(612) 888-1648

Attorney for Petitioner
**Counsel of Record*

APPELLATE ADVANTAGE
POST OFFICE BOX 7506 ◆ KANSAS CITY, MO 64116 ◆ 816-453-2424

55 pp

QUESTION PRESENTED

Whether the District Court improperly dismissed the petitioner's claims against the Gila River Indian Community for relief under 28 U.S.C. Section 1331.

The petitioner's Complaint alleged that "Federal law has divested the Tribe of sovereignty and jurisdiction over Johnson and his property", and that "the Tribe has unlawfully forced Johnson to litigate his rights and obligations in the Tribal Courts." Therefore, the question arises as to whether Johnson's allegation of an unlawful exercise of Tribal Court judicial power required the District Court to conduct an evidentiary hearing to determine under Section 1331 whether the Tribal Court has exceeded the lawful limits of its jurisdiction.

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Bruce Johnson, Plaintiff
Gila River Indian Community, Defendant
Lone Butte Industrial Development Corporation, Defendant

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and has been reported as 174 F. 3d 1032 (9th Cir. 1999).

The opinion of the United States District Court appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided petitioner's case was April 23, 1999. No petition for rehearing has been filed.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. Section 1331 Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

25 U.S.C. Section 1301 et seq Indian Civil Rights Act.

Section 1302. Constitutional rights

No Indian tribe in exercising powers of self-government shall ---

(1) make or enforce any law prohibiting the free exercise of religion, abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to trial by jury of not less than six persons.

STATEMENT OF THE CASE

A. Facts Material To Consideration Of Questions Presented.

In November 1996, the petitioner, Bruce Johnson, filed a Complaint in the United States District Court for District of Arizona and served copies thereof upon the named defendants, Lone Butte Industrial Development Corporation (Lone Butte), a corporation wholly owned and chartered by the other defendant, and the Gila River Indian Community (Tribe). In his Complaint, Johnson alleged that:

1. Jurisdiction of the District Court over the Tribe was founded upon 28 U.S.C. Section 1331 (Federal Question), 28 U.S.C. Section 1343 (4) (Civil Rights) and 25 U.S.C. 1302 (Indian Civil Rights Act), and over Lone Butte on diversity of citizenship and amount.

2. Johnson was a citizen of Minnesota and Lone Butte is a corporation chartered by the Tribe and doing business in the State of Arizona.

3. In December, 1993 Lone Butte commenced an action in the Gila River Indian Community Tribal Court naming Johnson as one of the defendants, and requesting the court to issue a declaratory judgment determining that Johnson was not the owner of certain personal property situated on the Gila River Indian Reservation over which property Lone Butte was claiming a landlord's lien pursuant to Arizona statutes. Lone Butte mailed a copy of its

Complaint to Johnson in Minnesota, but never effected personal service thereof upon Johnson.

4. Johnson specially appeared in the Tribal Court to challenge the Tribal Court's jurisdiction over him and his property, and to request transfer to Federal District Court. He also filed an answer and a counterclaim, alleging he was the rightful owner of the subject personal property, and demanded a judgment against Lone Butte for conversion of that property.

5. After substantial discovery took place based upon the original pleadings, the Tribal Court, at a pre-trial hearing, allowed Lone Butte, upon an oral motion with no prior notice to Johnson, to amend its Complaint to assert claims personally against Johnson which contradicted its original claims and required the assertion of personal jurisdiction over Johnson by the Tribal Court.

6. In January 1995, a trial was held in the Tribal Court. In September 1995, the Tribal Court issued a decision holding that Johnson was personally liable to Lone Butte for $660,000 - $500,000 of which was punitive damages.

7. Johnson attempted to file an appeal in Tribal Court. He filed a notice of appeal in October 1995, requested the rules of the Appellate Court and requested the address of the Clerk of the Appellate Court. He received some of this information in November 1995. Johnson then filed an appellate memorandum. In December 1995 Johnson wrote a letter to the clerk requesting more information; for example,

when the appellate brief was due, if there were additional rules, and when and how he would receive a transcript of the trial. At the same time he sent the clerk a copy of the transcript of the Tribal Court proceedings that he had prepared at his own expense as well as copies of his trial and post-trial briefs, and requested a decision based on the materials then before the court. No response to this request was rendered. In March 1996, the Tribal Appellate Court was asked to render a decision on pending motions. No response was rendered. In October 1996 a "Request For Decision" was filed. No response was rendered. In substance, Johnson alleged his attempt to exhaust his remedies in the Tribal Court system were futile.

8. Johnson further alleged that Federal law has divested the Tribe of sovereignty and jurisdiction over Johnson and his property; that through decisions of its Tribal Court, the Tribe has unlawfully forced Johnson to litigate his rights and obligations in the Tribal Courts; that the Tribal Court decision was not based upon the facts adduced at the trial in Tribal Court, but rather upon a bias in favor of the Tribal corporation, Lone Butte, and a racial prejudice against Johnson as a non-member of the Tribe, a non-resident of the reservation, and an individual of another ethnic group; that in such manner, and acting as agent for the Tribe, the Tribal Court had deprived Johnson of his property without due process of law in violation of 25 U.S.C. § 1302 (8), and

without just compensation in violation of 25 U.S.C. § 1302 (5).

Upon motions by both Lone Butte and the Tribe made before pleading, to dismiss for lack of jurisdiction, the District Court, with no prior hearing thereon, dismissed Johnson's Complaint against both defendants.

On appeal the Court of Appeals for the Ninth Circuit affirmed the dismissal of Johnson's claims against the Tribe, but reversed the dismissal of his claims against Lone Butte and remanded for further inquiry into whether a sufficient tribal appellate remedy exists for the purposes of exhaustion.

B. Basis For Jurisdiction In Federal District Court.

The District Court dismissed petitioner's claims on the pleadings, ruling that it had no jurisdiction over the Tribe because of sovereign immunity, and that petitioner had failed to exhaust his remedies against Lone Butte in the Tribal Court system.

The Court of Appeals affirmed the dismissal against the Tribe, but reversed the dismissal against Lone Butte and remanded for a hearing on petitioner's claim of futility.

Petitioner now seeks only a review of the dismissal of his claims against the Tribe.

Petitioner claims the doctrine of tribal sovereign immunity does not bar his claims against the Tribe. Petitioner claims that the federal common law has curtailed the powers

of the Tribe to compel him, as a non-Indian property owner, to submit his person or property to the jurisdiction of the Tribal Court. He argues that his claim of federal law diminution of sovereign immunity of the Tribe with respect to himself raises a question that must be answered by reference to federal law and is thus a "federal question" under 28 U.S.C. Section 1331.

Section 1331 provides that Federal Courts "shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." It is well settled that this statutory grant of jurisdiction will support claims founded upon federal common law as well as those of statutory origin. *Illinois v. City of Milwaukee*, 406 U.S. 91, 99-100 (1972), *National Farmer's Union Ins. Cos. V. Crow Tribe*, 468 U.S. 1315 (1984).

The federal common law relied upon by the petitioner to support his claims against the Tribe is a close reading of *National Farmers, supra*, a unanimous decision, which first enunciated the exhaustion of remedies rule with respect to concurrent Tribal Court jurisdiction, explaining that such rule is based upon a federal policy of supporting tribal self government and self determination. The Court explained that such federal policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal basis for the challenge. However, the Court added a caveat at Note 21, p. 844, of *National Farmers, supra*, that:

> We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith...."

The petitioner has alleged that the Tribal Court decision concerning his person and property was based "upon a bias in favor of the Tribal corporation, Lone Butte, and a racial prejudice against Johnson as a non-member of the Tribe, a non-resident of the reservation, and an individual of another ethnic group." Petitioner argues that such decision based upon bias and prejudice is properly includable in the concept of "conducted in bad faith" as stated by the Court in *National Farmers, supra.*

Since the District Court dismissed petitioners claims on the pleadings, without a hearing, the material facts alleged in the petitioner's Complaint must be taken as true for purposes of *review. Hospital Bldg.Co. v. Rex Hospital Trustees,* 425 U.S. 738, 740 (1976), *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.,* 334 U.S. 219, 222 (1948). Accordingly, petitioner should at least have been entitled to a hearing on his allegations before dismissal of his claims by the District Court.

REASONS FOR ALLOWANCE OF WRIT

The Supreme Court has often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. *Morton v. Mancari*, 417 U.S. 551 (1974) at p. 551, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1981) at p. 138, *New Mexico v. Mescalero Apache Tribe*, 462 U. 324 (1983) at p. 332, *National Farmer's Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985) at p. 856. The Supreme Court has also recognized that in enacting the Indian Civil Rights Act, 25 U.S.C. § 1301 et seq, Congress imposed "certain restrictions upon tribal governments, similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1977) at p. 57. These decisions all presuppose the furtherance of the "Rule of Law" by tribal self government. This presupposition is acknowledged in *National Farmers, supra*, which ruled that Congress' policy of supporting tribal self government favors a policy of exhaustion of tribal remedies when tribal court jurisdiction is challenged. *National Farmers*, supra, at p. 856. That acknowledgement is set forth, as a caveat, in note 21 at p. 856 where the Court stated:

> We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction is motivated by a desire to harass

> or is conducted in bad faith,...or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

It appears that here the Court is acknowledging that the exhaustion of tribal remedies is predicated upon the assumption that an independent tribal judiciary exists in which to exhaust tribal remedies, a requisite for the "Rule of Law" to prevail. If no independent tribal judiciary exists, there would be no independent forum in which an aggrieved party could obtain relief.

Such is the situation alleged by the petitioner in his Complaint filed in District Court. In his Complaint, the petitioner alleged:

> 20. In asserting personal jurisdiction over Johnson, and basing its decision upon racial bias and prejudice, the Tribal Court, acting as agent of the Tribe, deprived Johnson of his property without due process of law in violation of 25 U.S.C. § 1302 (8).

and

> 25. ...the tribe caused a Tribal Court decision which has taken from Johnson, and

> deprived Johnson of his property without just compensation in violation of 25 U.S.C. § 1302 (5).

Here the petitioner is alleging that the tribal court was acting as an agent for the tribe, not as an independent judiciary, and that as such the tribe "caused a Tribal Court decision" which was based upon "racial bias and prejudice". Surely such decision would fall squarely within the exception of "assertion of tribal jurisdiction... conducted in bad faith" set forth by the Court in *National Farmers* as set forth above.

However, the District Court ignored the caveat quoted above from *National Farmers*, that assertions of jurisdiction "conducted in bad faith" do not require exhaustion. The District Court simply stated at p. 4 of its decision that:

> ...sovereign immunity bars actions against tribes in their sovereign capacities and against their subordinate entities in federal court.

The Court of Appeals below also ignored the petitioner's allegations of bad faith and the quoted caveat from *National Farmers* when it simply stated, at p. 1035:

> As sovereign nations, Indian tribes possess common law immunity from suit in federal court. See *Santa Clara Pueblo v. Martinez*...

Thus, both the District Court and the Court of Appeals overlooked the critical allegations of petitioner that his rights were denied by a dependent tribal judiciary acting pursuant to conduct based upon bias and racial prejudice by the Tribe, rather than on an unbiased and unprejudiced act of an independent tribal judiciary acting under the "Rule of Law" as intended by Congress, as interpreted by the Supreme Court in construing the Indian Civil Rights Act.

As stated, the caveat to the exhaustion rule set forth in *National Farmers* appears to acknowledge that the exhaustion rule presumes the existence of an independent tribal judiciary. However, many federal decisions belie this presumption. For example, the independence of the tribal judiciary was questionable in *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F. 2d 682 (10th C. 1980) where in stating the facts of the case, the Court stated at p. 684:

> ...Thereafter the plaintiff's sought a remedy with the Tribal court, but were refused access to it. The judge indicated he could not incur the displeasure of the Council and that consent of the Council would be needed...The consent was not given.

and *Runs After v. United States*, 766 F. 2d 347 (8th C. 1985) where, again, in stating the facts, the Court stated, at p. 348:

> The next day, however, the Tribal Council terminated the Tribal Court Judge, allegedly because of the decision enforcing the reapportionment, rescinded the Tribal Court order directing elections to be held in thirteen Election districts, and appointed a new tribal judge...

And, in fact, the very non-existence of a tribal court was the basis for *Krempel v. Prairie Island Indian Community*, 125 F3d 621 (8th C. 1997), which exempted the plaintiff from exhausting his remedies in a tribal court which came into existence only after he had filed suit in federal court.

In *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F2d 1166 (10th Cir. 1992) the court appears to find that *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) superseded the *National Farmers* caveat. The *Muscogee* court said, at p. 1171:

> . . . *Iowa Mutual* required a non-Indian party alleging bias and incompetence on the part of the tribal court to litigate these issues in tribal court. (Emphasis supplied)

However, that court appears to have misread *Iowa Mutual*, because in *Iowa Mutual* the Court said, at p. 19:

> ...The alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement established in *National Farmers Union*...(Emphasis supplied)

That the *Iowa Mutual* decision was limiting its statement only to incompetence, and not including bias as represented in *Oklahoma v. Muscogee* is made clear in Footnote 12, where the *Iowa Mutual* decision added:

> ...While petitioner contends that tribal court jurisdiction over outsiders "is questionable at best"...it does not argue that the present action is "patently violative of express jurisdictional prohibitions", nor do we understand it to invoke any of the other exceptions enumerated in National Farmers Union. (Emphasis supplied)

These decisions which misconstrue the *National Farmers* caveat, or fail to acknowledge the *National Farmers* caveat altogether, defeat the intention of Congress, as interpreted by the Supreme Court, to promote the rule of law in tribal self government by encouraging the development of an independent tribal judicial system.

The petitioner presents to the Supreme Court, a record, the review of which would facilitate the clarification

of the exceptions to the exhaustion rule noted in *Farmers Union*. The petitioner has alleged and argued below that:

1. The Tribal Court granted a pre-trial motion, which extended personal jurisdiction over the petitioner, who had appeared specially to contest jurisdiction over his property, without explaining the basis for the Tribal Court's extension to personal jurisdiction over petitioner, and

2. The Tribal Court delayed nine months in rendering its decision, and

3. The Tribal Court then adopted, verbatim, the proposed Findings of Fact, Conclusions of Law and Order for Judgement submitted after trial by the tribal corporation, Lone Butte, and

4. The Tribal Court even failed to proofread its transcription of Lone Butte's proposed Findings, Conclusions etc., as several typographical errors in transcription made obvious, and

5. The Tribal Court never gave any explanation or rationale for its exercise of personal jurisdiction over the petitioner in its Findings and Conclusions, etc. and

6. The petitioner never received any response from the Tribal judicial system concerning his attempted appeal, despite many requests.

These allegations of fact were made to support the conclusory allegation that the conduct of the Tribal Court was not the manifestation of an independent judiciary, but was rather the manifestation of biased Tribal politics based on

racial prejudice[1]. Certainly, these arguments and offers ought to have earned the petitioner an evidentiary hearing on his claims. He received none.

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[1]Upon the conclusion of the Tribal Court trial in January, 1995, counsel for petitioner was confident the trial judge had endeavored to conduct a fair trial, and had allowed into evidence substantially all of the petitioner's proffered testimony and exhibits. Therefor, after waiting nearly nine months for a decision, counsel was anticipating a decision crafted by the judge himself setting forth his independent Findings of Fact and Conclusions of Law. Instead, the decision adopted verbatim the Findings and Conclusions submitted by opposing counsel upon conclusion of the trial, except that the court transcription of these Findings and Conclusions contained two separate deletions of typographical lineage leaving the remaining text unintelligible. This leads to the inescapable conclusion that the trial judge himself did not even proofread this transcription. After exerting such a conscientious effort to conduct a fair trial, why did this judge not even proofread the transcription, and why did he wait nine months to render the decision. Counsel can only conclude that he was compelled by "higher authority" to sign the prepared transcription albeit reluctantly. This conclusion is buttressed by the delay of well over three years in receiving any kind of response from the Tribal judicial system to petitioner's prompt attempt to appeal the decision despite numerous inquiries and requests for decision during this interim period.

The Court of Appeals seems to have misperceived that petitioner did have a hearing in District Court on his claims of bias and prejudice when it stated at p. 1033 of its decision that:

> ...we reverse the district court's grant of summary judgement and remand for further proceedings.

However, the District Court did not grant summary judgment; rather it granted the Rule 12 (b) motion of the tribe for dismissal on the pleadings, there having been no "matters outside the pleadings" presented for consideration by the District Court. Fed. R. Civ. P. 12 (b). Consequently, because there was never a hearing on the allegations set forth in his pleadings, both courts below were required to assume the truth of all material facts alleged in the petitioner's Complaint. *Hospital Bldg. Co. v. Rex Hospital Trustees*, 425 U.S. 738, 740 (1976), *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948). These allegations, if assumed to be true (as required by the cited cases), clearly constitute an "assertion of Tribal jurisdiction...conducted in bad faith" as enunciated by the unanimous court in *National Farmers* as set forth above. As such, they earned petitioner an immediate hearing on jurisdiction in District Court. Yet both the District Court and the Court of Appeals skipped over this procedural step in

summarily dismissing petitioner's claims on the stated grounds of sovereign immunity.

The petitioner has abided by all the rules prescribed by Supreme Court decisions for obtaining relief against an Indian Tribe in federal court, but has been denied access to the federal court by the decisions of the courts below.

The petitioner:

1. Appeared specially in Tribal Court to contest the jurisdiction of that court over his personal property.

2. When he appeared specially, the Tribal Court granted an impromptu motion to assert additional and unrelated claims personally against petitioner without providing an explanation for the new assertion of personal jurisdiction over petitioner.

3. Despite such egregious development, the petitioner proceeded to trial in Tribal Court and then waited over nine months for a decision.

4. The decision, when rendered, was not supported by the record, and again did not explain the basis for the assertion of Tribal Court jurisdiction over petitioner.

5. Nevertheless, the petitioner proceeded to attempt to appeal the Tribal Court decision without receiving any response from the tribal judicial system for well over three years.

6. Finally, petitioner filed a Complaint in Federal District Court alleging the Tribal Court, acting as agent for the Tribe, had asserted tribal jurisdiction over petitioner in

bad faith based upon bias and racial prejudice. He alleged many of the facts set forth above and is prepared to prove them all.

7. Despite abiding by these dilatory, but prescribed procedures, the petitioner's claims against the Tribe were summarily rejected on the pleadings without the benefit of any evidentiary or other hearing.

The record petitioner has established in the courts below, now presents the Supreme Court with an opportunity to clarify the route to an expeditious entry into the federal courts when such may be necessary or desirable to further the "Rule of Law" in Tribal self government.

SUMMARY

Petitioner has presented a record of compliance with the rules for exhaustion of Tribal remedies prior to seeking relief in the federal courts. He has not merely alleged bad faith by biased and prejudiced conduct, but has actually experienced same and alleged examples of same. Pursuant to the caveat of *National Farmers* he should have been granted an initial hearing on these allegations in federal court, but was not. The grant of petitioner's Petition for Certiorari will enable the Supreme court to:

1. Review whether the doctrine of tribal sovereign immunity precludes the federal courts from an initial determination of whether the assertion of Tribal Court

jurisdiction was conducted in bad faith by the Tribal judicial system as alleged by petitioner, and

2. Further the intent of Congress that the "Rule of Law" by an independent judiciary is imbedded in the Indian Law pursuant to the Indian Civil Rights Act, and

3. Explain and clarify the parameters of the bad faith exceptions to the exhaustion principle as observed by the unanimous decision in *National Farmers, supra*, and

4. Implement such explanation by remanding this case for further proceedings in the District Court.

CONCLUSION

For the forgoing reasons, Petitioner requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

Richard J. Sundberg
Attorney for Petitioner
11025 Irwin Ave. So.
Bloomington, MN 55437
(612) 888-1648

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Order

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DEPUTY BRUCE JOHNSON, Plaintiff, v. GILA RIVER INDIAN COMMUNITY, and ORDER LONE BUTTE INDUSTRIAL DEVELOPMENT CORPORATION, a corporation chartered by the Gila Indian Community, Defendants.	)	CIV-96-2594 PHX EHC ORDER

Plaintiff Bruce Johnson filed his Complaint against the Gila River Indian Community ("Tribe") and the Lone Butte Industrial Development Corporation ("Lone Butte"), a corporation chartered by the Gila Indian Community. Plaintiff alleges that this Court has subject matter jurisdiction based upon diversity of citizenship and amount in controversy. (Dkt. 1).

Plaintiff alleges the following facts: In December 1993, Lone Butte commenced an action in the Gila River Indian Community Tribal Court ("Tribal Court") against Plaintiff among others. Lone Butte sought a declaration that Plaintiff was not the owner of certain personal property situated on the Tribe's Reservation and over which Lone

Butte claimed a landlord's lien under Arizona statutes. Plaintiff specially appeared and filed an action challenging Tribal jurisdiction over him and his property and requesting transfer to federal court. Plaintiff thereafter filed an amended answer and counterclaim in Tribal Court. In his counterclaim, Plaintiff demanded judgment against Lone Butte for conversion of his personal property.

Following extensive discovery, the Tribal Court permitted Lone Butte to amend its complaint to allege claims against Plaintiff personally. Plaintiff contends that these claims contradicted earlier claims and that the Tribal Court lacked personal jurisdiction over him. Trial was held by the Tribal Court in January 1995. On September 18, 1995, the Tribal Court entered a decision which "depriv[ed]" Plaintiff of his personal property and awarded Lone Butte a personal judgment against Plaintiff for $660,000, including an award of punitive damages o $500,000.

Plaintiff appealed the judgment of the Tribal Court on October 23, 1995. Lone Butte filed its response on January 8, 1996. Plaintiff contends that he was provided with contradictory rules by the Tribal Court Clerk regarding appellate rules and procedures. Despite periodic requests by Plaintiff and Lone Butte, a decision has not yet been rendered on the appeal.

On March 11, 1996, Plaintiff filed a complaint in federal court. *Johnson v. Gila River Indian Community*, CIV 96-633-PHX-CAM. That action was dismissed on grounds of comity because Plaintiff had failed to exhaust

tribal remedies. Plaintiff did not appeal the decision.

In this action, Plaintiff alleges claims for "Wrongful Exercise of Jurisdiction over Johnson," "Violation of 25 U.S.C. 1302(8)(Due Process)," "Violation of 25 U.S.C. § 1302(5)(Taking property without just compensation)," conversion, and claims for declaratory and injunctive relief. The Tribe and Lone Butte have each filed a motion pursuant to Rule 12(b)(1), (2) and (6). (Dkt. 3 and 4).

Indian tribes retain the attributes of sovereignty over members and territory to the extent that sovereignty has not been withdrawn. *Iowa Mutual v. LaPlante*, 480 U.S. 9, 18 107 S.Ct. 971, 94 L.Ed.2d 10 (1987). As "domestic dependent nations," Indian tribes exercise inherent sovereign authority over their members and territories absent a clear waiver by the Tribe or congressional abrogation. *Oklahoma Tax Commission v. Citizens Band Potawatami Indian Tribe*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59, 98 S.Ct. 1670, 1676-77 (1978). Federal courts do not have jurisdiction over state law claims brought against Indian tribes absent a clear waiver or congressional abrogation of the tribe's sovereign immunity. *In re Greene*, 980 F.2d 590, 593-96 (9th Cir. 1985)(under Arizona law, subordinate economic enterprises owned and operated by an Indian tribe was immune from suit for tort or breach of contract even when the enterprise operated outside tribal boundaries), *cert. denied sub. nom.*, 510 U.S. 1039 (1994).

Furthermore, where an Indian tribe has subject matter jurisdiction over a local law claim, even the claim of

a nonmember, federal law vests the tribal court with exclusive jurisdiction. *Babbitt Ford v. Navajo Tribes*, 710 F.2d 587, 592 (9th Cir. 1983)(tribal authority over non-members arises when non-member enters tribal jurisdiction or conducting business with tribe), *cert. denied*, 466 U.S. 926 (1984). In addition, sovereign immunity bars actions against tribes in their sovereign capacities and against their subordinate entities in federal court. *See Burlington Northern v. Blackfeet Tribe*, 924 F.2d 899 901 n.3 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992). A tribe's sovereign immunity also precludes an action or claim against it in federal court for declaratory or injunctive relief *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269 (9th Cir. 1991); *California Dep't of Fish and Game v. Quechan Tribe of Indians*, 595 F.2d 1153, 1156 (9th Cir. 1979).

Plaintiff brings claims pursuant to the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1302(5) and (8), among others, against the Tribe contending that the Tribe has converted his property without due process based upon the delay in ruling on his appeal.[1] Plaintiff contends that the

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[1]25 U.S.C. § 1302(5) provides that "[n]o Indian tribe in exercising powers of self-government shall . . . take any private property for a public use without just compensation." Section 1302(8) provides that "[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process

Tribe is therefore not entitled to assert Tribal sovereign immunity. Plaintiff further contends that to the extent that the Tribe is entitled to sovereign immunity, he has exhausted tribal remedies by filing a appeal upon which the Tribal Court has failed to rule in a reasonably timely manner.

Protections of the ICRA apply to "any person" subject to tribal jurisdiction, including non-Indians. *See Tracy v. Superior Court of Maricopa County*, 168 Ariz. 23, 810 P.2d 1030 (1991); *Dodge v. Nakai*, 298 F.Supp. 17, 24 (D.Ariz. 1968). However, federal courts lack jurisdiction to hear claims against Indian tribes under the ICRA except in habeas corpus proceedings *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978); Snow *v. Quinault Indian Nation*, 709 F.2d 1319, 1321 (9th Cir. 1983), cert. denied, 467 U.S. 1214 (1983); *White v. Pueblo of San Juan*, 728 F.2d 1307, 1309-10 (10th Cir. 1984). A narrow exception to tribal sovereign immunity has also been recognized by federal courts under certain other circumstances. *Dry Creek Lodge, Inc. v. Arapahoe* and Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981); *Little Horn State Bank v. Crow Tribal Court*, 690 F.Supp. 919, 921 (D.Mont. 1988), *vacated* 708 F. Supp. 1561, 1561 (D.Mont. 1989). *See White v. Pueblo of San Juan*, 728 F.2d 1307, 1309-10 (10th Cir. 1984)(limiting exception to tribal sovereign immunity

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of law."

found in *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1981).

Plaintiff argues that the delay in resolving his appeal is analogous to the situations in the few cases in which federal jurisdiction has been found under the ICRA despite Indian sovereign immunity. The Court concludes otherwise.

In *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. (1981), the non-Indian fee owners of a patented tract of land within the boundaries of the Wind River Reservation sought relief in federal court under the ICRA. The plaintiffs had constructed a lodge on their land and been assured of access from the sole road connecting the land to the principal highway by tribal representatives. The sole access road from the lodge to the principal highway was thereafter blocked by the Tribes pursuant to the request of a nearby Indian family. The plaintiffs thereafter obtained a temporary restraining order from federal court, enabling them to leave their property, and attempted to pursue remedies in tribal court. However, the tribal court declined to hear the case unless the tribal council gave its consent. The tribal council declined to do so.

The Tenth Circuit held that federal courts had jurisdiction to hear the matter where there was no tribal forum available. 623 F.2d at 685. However, the Tenth Circuit subsequently held that the availability of a remedy in tribal court precludes the jurisdiction of federal courts

before those remedies have been exhausted, noting in that case, unlike *Dry Creek Lodge*, the plaintiff had not exhausted remedies in tribal courts. *White*, 728 F.2d at 1312. In any event, the Ninth Circuit has not endorsed the *Dry Creek Lodge*. *Snow, supra.*; *R.J. Williams Co. v. Fort Belknap Hous. Auth.*, 719 F.2d 979, 981 (9th Cir.), *cert. denied*, 472 U.S. 1016 (1985).

In *Little Horn State Bank v. Crow Tribal Court*, 690 F.Supp. 919, 921 (D.Mont. 1988), a non-Indian plaintiff sought a default judgment- against Indian defendants. The defendants were served but failed to appear and defend in tribal court. Despite stating on the record that findings of fact and conclusions of law would be entered within five days, the tribal court failed to enter default judgment for more than two years. After plaintiff subsequently gained possession of the forklift in which it held purchase money security interest, the Crow Tribal Court issued a ex parte order requiring the plaintiff to return the forklift. The defendants to the default judgment action then caused the tribal order to be filed in state court without notice to the plaintiff. The District Court granted plaintiff a permanent injunction from enforcement of the order in federal court pursuant to the ICRA based upon a "gross violation" of Plaintiff's due process rights citing *Dry Creek Lodge*. The district court subsequently vacated its order. 708 F. Supp. at 1561.

Assuming the exceptions in *Dry Creek Lodge* and the first *Little Horn Bank* decision were good law in the Ninth Circuit, Plaintiff has not shown that mere delay in

resolving an appeal falls within those exceptions. Both cases involved additional egregious facts which effectively denied the litigants a remedy in tribal court. Such has not been shown to be the case here.

Plaintiff acknowledges that he appeared in Tribal Court to assert a counterclaim. Plaintiff also acknowledges that his appeal remains pending in Tribal Court. The mere lapse of two years' time is not sufficient to overcome the Tribe's sovereign immunity. The motions to dismiss will be granted without prejudice to refiling with a showing of an egregious lapse of time or other facts showing that no further relief is available in Tribal Court.

Accordingly,

IT IS ORDERED granting Defendants' motions to dismiss and dismissing this action without prejudice. (Dkt. 3 and 4).

DATED this 30 day of September, 1997.

/s/ Earl H. Carroll
Earl H. Carroll
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRUCE JOHNSON,
Plaintiff-Appellant,

v.

GILA RIVER INDIAN COMMUNITY;
LONE BUTTE INDUSTRIAL
DEVELOPMENT CORPORATION, a
corporation chartered by the Gila
River Indian Community,
Defendants-Appellees.

No. 97-17213

Appeal from the United States District Court
for the District of Arizona
Earl H. Carroll, District Judge, Presiding

Argued and Submitted
February 11, 1999--San Francisco, California

Filed April 22, 1999

Before: James R. Browning, Harlington Wood, Jr.,[1] and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Sidney R. Thomas

COUNSEL

Richard J. Sundberg, Bloomington, Minnesota, for the plaintiff-appellant.

Kane Jorden von Oppenfeld, Douglas A. Jorden, and Ellen M. Van Riper, Bischoff & Biskind, Phoenix, Arizona, for defendant-appellee Lone Butte Industrial Development Corporation.

Rodney B. Lewis, Sacaton, Arizona, for defendant-appellee Gila River Indian Community.

OPINION

THOMAS, Circuit Judge:

This appeal involves the question of whether a litigant must exhaust his appellate remedies in tribal court

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[1]The Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the United States Court of Appeals for the Seventh Circuit, sitting by designation.

when the tribal appellate court has not responded to initial appellate pleadings for an extended period of time. Because the record creates sufficient doubt as to whether the futility exception to the exhaustion doctrine applies, we reverse the district court's grant of summary judgment and remand for further proceedings.

I

The Gila River Indian Community ("the Tribe") is a federally recognized Indian tribe with its reservation located in Arizona. In 1966, the Tribe leased real property located on its reservation to Lone Butte Industrial Development Corporation ("Lone Butte"), a corporation chartered by the Tribe. In 1979, Lone Butte entered into a sublease of the property with Genstar Corporation, which built a rubber processing plant on the property. In 1987, the Tonson Corporation purchased Genstar's business with funds loaned by Tonson shareholder Bruce Johnson. As part of the transaction, Johnson acquired a security interest in rubber processing equipment located on the property. Subsequently, Johnson foreclosed his security interest, took possession of the secured property, and Tonson ceased operation. Another corporation, International Rubber, then assumed the Genstar lease, but failed to pay rent to Lone Butte. In 1991, Lone Butte terminated the Genstar lease.

Later that year, International Rubber entered into a new sublease with Lone Butte for the use of the property and leased the rubber processing equipment from Johnson. After International Rubber failed to fulfill its obligations

under the new lease, Lone Butte terminated the new lease and secured the premises. Lone Butte notified Johnson that it claimed a landlord's lien on the equipment for unpaid rents and damages. Thereafter, Johnson attempted to remove the rubber processing equipment and the building but was denied access to the property.

In December 1993, Lone Butte filed a claim in the Gila River Indian Community Tribal Court, contesting the ownership of the building and the rubber processing equipment located on the property. Lone Butte sued International Rubber and Bruce Johnson, as it believed that both defendants might have ownership interests in the building and the equipment. Lone Butte also sued International Rubber for its alleged failure to remove rubber tires from the property.

After receiving notice by mail, Johnson specially appeared in the tribal court to challenge the tribal court's jurisdiction over him and his property and to request transfer to federal district court. He also filed an answer and a counterclaim, alleging he was the rightful owner of the building and the rubber processing equipment. The tribal court permitted Lone Butte to amend its complaint and file an in personam claim against Johnson for trespass and environmental nuisance. Johnson challenged the tribal court's personal jurisdiction over him.

In January 1995, a trial commenced in the tribal court. In September 1995, the court announced its decision, issued findings of fact, and held that Johnson was liable to Lone Butte for $660,000--$500,000 of which was punitive

damages.

Johnson attempted to file an appeal in tribal court. He filed a notice of appeal in October 1995, requested the rules of the appellate court, and requested the address of the clerk of the appellate court. He received some of this information in November 1995. Johnson then filed an appellate memorandum. In December, Johnson wrote a letter to the clerk requesting more information, for example, when the appellate brief was due, if there were additional rules other than those with which he had been provided, and when and how he would receive a transcript of the trial. At the same time, he sent the clerk a copy of the transcript of the tribal court proceedings that he had prepared at his own expense as well as copies of his trial and post-trial briefs.

In January 1996, Lone Butte filed response briefs, additional memorandum, and two motions in tribal court. The parties heard nothing from the appellate court for more than a year. In March 1996, Lone Butte filed a request for a ruling on the pending motions, but the clerk never responded to this request.

On March 11, 1996, Johnson filed a complaint in the United States District Court for District of Arizona, claiming that the tribal court lacked personal jurisdiction over him, that his property had been taken without just compensation, that Lone Butte was liable for conversion, and asking the court to issue an injunction to prevent Lone Butte from enforcing the tribal court judgment. The district court, in May 1996, dismissed his complaint for failure to exhaust tribal remedies. In October 1996, Lone Butte

requested that the tribal appellate court render a decision in the pending appeal.

In November 1996, Johnson filed a second complaint in the same district court, this time alleging, in relevant part, that the tribal court had violated the Indian Civil Rights Act and that Lone Butte had wrongfully converted his property. Johnson also asked the district court to issue a declaratory judgment and an injunction prohibiting Lone Butte from enforcing the tribal court judgment because he claimed that the tribal court had lacked personal jurisdiction over him and his property. He alleged that the district court had jurisdiction over the Tribe under 28 U.S.C. S 1331, and over Lone Butte under 28 U.S.C. S 1332. In October 1997, the district court again dismissed Johnson's action.

II

[1] As sovereign nations, Indian tribes possess common law immunity from suit in federal court. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Accordingly, the district court correctly dismissed Johnson's claims against the Tribe pursuant to the Indian Civil Rights Act ("ICRA"), 25 U.S.C. SS 1302(5) and 1302(8). The only recognized exception to a sovereign immunity defense under the ICRA is a habeas corpus action. *See Santa Clara*, 436 U.S. at 59; *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1189 (9th Cir. 1998). Because Johnson does not seek such relief, and the Tribe has not waived its sovereign immunity defense, the district court properly

dismissed Johnson's claims against the Tribe.[2]

III

[2] Because Lone Butte and Johnson are citizens of different states and the amount in controversy exceeds $75,000, the district court had concurrent jurisdiction with the tribal court over Johnson's claims against Lone Butte pursuant to 28 U.S.C. S 1332.[3]

[3] When federal and tribal courts have concurrent jurisdic- tion over a claim, "considerations of comity direct that tribal remedies be exhausted before the question is addressed by the District Court." *Iowa Mut. Ins. Co. v.*

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[2]Johnson argues that *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682, 685 (10th Cir. 1980), affords him relief under the ICRA. However, except in habeas corpus actions, this circuit has not recognized relief under the Act against a tribe in a civil action. *See Pink*, 157 F.3d at 1189; *Snow v. Quinault Indian Nation* , 709 F.2d 1319, 1323 (9th Cir. 1983); *Trans-Canada Enters., Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474, 476-77 (9th Cir. 1980). In addition, the Tenth Circuit has limited *Dry Creek* to extraordinary circumstances not present in this case. *See Bank of Okla. v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1170 (10th Cir. 1992); *White v. Pueblo of San Juan*, 728 F.2d 1307, 1312 (10th Cir. 1984).

[3]The tribal court had subject matter jurisdiction over the claims because they arose out of commercial relationships with the Tribe on its reservation. *See Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997). We do not reach the question of whether the tribal court had personal jurisdiction over Johnson.

LaPlante, 480 U.S. 9, 15 (1987); *see also National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 857 (1985); *Stock West Corp. v. Taylor*, 964 F.2d 912, 920 (9th Cir. 1992) (en banc).

[4] However, this prudential rule has exceptions, as the Supreme Court noted in *Iowa Mutual*:

> [E]xhaustion [is] not required where an assertion of tribal court jurisdiction is motivated by a desire to harass or is conducted in bad faith, or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction.

480 U.S. at 19 n.12 (citations and internal quotation marks omitted).

[5] Johnson's primary claim is that a two-year delay in the tribal appellate court renders his appellate claim futile. Delay alone is not ordinarily sufficient to show that pursuing tribal remedies is futile. However, if a functioning appellate court does not exist, exhaustion is per se futile. *See, e.g., Krempel v. Prairie Island Indian Community*, 125 F.3d 621, 622 (8th Cir. 1997) (holding that a litigant need not exhaust tribal remedies when no functioning court existed at the time the original complaint was filed in district court). In this instance, the lack of a briefing schedule, scheduled appellate argument, a meaningful

response to the notice of appeal, or an answer to any of Johnson's correspondence for an abnormally extensive period create doubt that a functioning appellate court exists. Accordingly, Johnson raised sufficient genuine issues of material fact as to whether exhaustion would be futile, thus precluding dismissal of his claim.

[6] We therefore reverse the district court's dismissal of Johnson's claims against Lone Butte and remand for the district court to conduct a further inquiry into whether a sufficient tribal appellate remedy exists for the purposes of exhaustion. We affirm the dismissal of Johnson's claims against the Tribe. Each party shall bear its own costs.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Complaint

Richard J. Sundberg Minnesota #107244
Attorney For Plaintiff
11025 Irwin Avenue South
Minneapolis, MN 55437
(612) 888-1648

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
PHOENIX DIVISION

Bruce Johnson,
Plaintiff,
vs.

Gila River Indian Community, and Lone Butte Industrial Development Corporation, a corporation chartered by the Gila River Indian Community,
Defendants.

COMPLAINT

For his Complaint against the defendants, plaintiff complains and alleges as follows:

JURISDICTION

1. Jurisdiction of this court over the Gila River Indian Community (Tribe) is founded on the Indian Civil Rights Act, 25 U.S.C. Section 1302, 28 U.S.C. Section

1343 (4), and 28 U.S.C. Section 1331.

2. Jurisdiction of this court over the Lone Butte Industrial Development Corporation (Lone Butte) is founded on diversity of citizenship and amount. The plaintiff, Bruce Johnson (Johnson) is a resident of the State of Minnesota, and Lone Butte is a corporation chartered by the Tribe and doing business in the State of Arizona. The amount in controversy exceeds, exclusive of interest and costs, the sum of Fifty Thousand dollars.

GENERAL ALLEGATIONS

3. In December, 1993 defendant, Lone Butte commenced an action in the Gila River Indian Community Tribal Court, naming the plaintiff herein, Johnson, as one of the defendants, and requesting in its Complaint therein that the Tribal Court issue a declaratory judgment that Johnson was not the owner of certain personal property situated on the Gila River Indian Reservation over which property Lone Butte was claiming a landlord's lien pursuant to Arizona statutes.

4. Johnson specially appeared in said action by filing an Answer to the Complaint of Lone Butte in which he denied the jurisdiction of the Tribal Court over his person and property and requested a transfer of the action to federal court for determination. However, after learning that the Tribal Court followed the Arizona State Rules of Civil Procedure, which require the assertion of certain compulsory counterclaims to avoid a waiver of same, and

learning that the United States Supreme Court required the exhaustion of remedies in tribal courts prior to seeking relief in federal courts, Johnson filed an Amended Answer and Counterclaim in the Tribal Court in which counterclaim he demanded judgment against Lone Butte for the conversion of Johnson's personal property which constituted the subject matter of Lone Butte's claim against him in said action.

5. After substantial discovery took place based upon the pleadings described above, the Tribal Court allowed Lone Butte to amend its complaint to assert claims personally against Johnson which contradicted its original claims and required the assertion of personal jurisdiction over Johnson by the Tribal Court.

6. In compliance with decisions of the United States Supreme Court, Johnson proceeded to litigate in Tribal Court before seeking relief in Federal Court.

7. The Tribal Court trial was held in January, 1995, and nine months later, on or about September 18, 1995, the Tribal Court entered a decision depriving Johnson of his personal property and awarding Lone Butte a personal judgment against Johnson for $660,000.00, which included an award of punitive damages in the amount of $500,000.00.

8. Johnson has attempted to appeal the decision of the Tribal Court to the Tribal Court of Appeals, but is uncertain of the tribal laws and rules governing such appeals, and has been supplied by the Tribal Court clerk with contradictory rules, and ignored by the Tribal Court

when requesting information on how he should proceed with his appeal.

9. Johnson has attempted to exhaust his remedies in the tribal courts, but his attempt to obtain review of the Tribal Court decision has been futile. On December 10, 1995, the tribal appellate court was asked to render a decision on the materials then before it. No response to this request has been rendered. On March 1, the tribal appellate court was asked to render a decision on pending motions. No response was rendered. On October 15, 1996 a "Request For Decision" was filed. No response has been rendered.

10. On March 11, 1996 Johnson filed a Complaint in this court seeking relief, but such Complaint was dismissed by this court before Johnson was allowed his right to respond to the motion to dismiss. Six months have now elapsed since such Complaint was dismissed and Johnson has still not received any response to his appeal to the tribal appellate court which was filed well over a year ago.

11. Lone Butte is a corporation chartered by the defendant, Gila River Indian Community, and Johnson believes it is also owned and/or controlled by said defendant.

12. Johnson has never been personally served with the process commencing the aforesaid litigation in Tribal Court.

CAUSES OF ACTION

CLAIMS AGAINST TRIBE

Wrongful Exercise Of Jurisdiction Over Johnson

13. Johnson realleges the allegations set forth in paragraphs 3 through 12 above.

14. Federal law has divested the Tribe of sovereignty and jurisdiction over Johnson and his property.

15. Through decisions of its Tribal Courts, the tribe has unlawfully forced Johnson to litigate his rights and obligations in the Tribal Courts.

CAUSES OF ACTION

CLAIMS AGAINST TRIBE

Violation Of 25 USC Section 1302 (8)

(Due Process)

16. Johnson realleges the allegations set forth in paragraphs 3 through 12 above.

17. The Tribal Court lacked jurisdiction over the person of Johnson.

18. Through decisions of its Tribal Court, the Tribe forced Johnson to litigate his property rights in Tribal Court.

19. The Tribal Court decision was not based upon the facts adduced at the trial in tribal court, but rather upon a bias in favor of the Tribal corporation, Lone Butte, and a racial prejudice against Johnson as a non-member of the Tribe, a nonresident of the reservation, and an individual

of another ethnic group.

20. In asserting personal jurisdiction over Johnson, and basing its decision upon racial bias and prejudice, the Tribal Court, acting as agent of the Tribe, deprived Johnson of his property without due process of law in violation of 25 USC Section 1302 (8).

21. Johnson's property had a value of $2,000,000.

22. The deprivation of due process by the Tribe has damaged Johnson in the amount of $2,660,000.

Violation of 25 USC Section 1302 (5)

(Taking property without just compensation)

23. Johnson realleges the allegations set forth in paragraphs 3 through 19 above.

24. The negligence of Lone Butte, and breaches of contract by other persons dealing with Lone Butte, caused substantial financial losses to Lone Butte, and environmental problems for the Tribe.

25. In an attempt to erradicate these problems, the Tribe caused a Tribal Court decision which has taken from Johnson, and deprived Johnson of his property without just compensation in violation of 25 USC Section 1302 (5).

26. Johnson's property had a value of $2,000,000.

CLAIMS AGAINST LONE BUTTE

Declaratory Judgment

27. Johnson realleges the allegations set forth in paragraphs 3 through 26 above.

28. The Tribal Court lacked jurisdiction over the person of Johnson.

29. The Tribal Court entered a personal judgment against Johnson despite lacking such jurisdiction over Johnson.

30. Johnson is subject to attempts by Lone Butte to enforce the Tribal Court judgment in other jurisdictions unless this Court enters a declaratory judgment, pursuant to Rule 57 of the Federal Rules of Civil Procedure, adjudicating that the Tribal Court judgment v. Johnson is void for lack of personal jurisdiction over Johnson.

Injunction

31. Johnson realleges the allegations set forth in paragraphs 3 through 30 above.

32. Johnson is in need of an injunction by this court enjoining Lone Butte from attempting to enforce its tribal judgment in other jurisdictions.

33. Johnson has no adequate remedy at law in that defending against enforcement of the tribal judgment in other jurisdictions would duplicate, at unreasonable cost to Johnson, the litigation over the issues before this court raised by these pleadings.

Conversion

34. Johnson realleges the allegations set forth in paragraphs 3 through 12 above.

35. Johnson was the owner of certain industrial machinery, equipment and personal property situated on certain premises (Leased Premises) located in the Lone Butte Industrial Park within the boundaries of the Gila River Indian Community in the state of Arizona, possession of which he had leased to the occupant of such leased premises, which occupant occupied such premises under a lease from Lone Butte.

36. On or about March 3, 1992, Lone Butte caused a lockup of the leased premises upon which Johnson's property was situated, and thereafter failed and refused to allow Johnson access to his personal property, though such was repeatedly requested.

37. On January 14, 1995, Johnson attempted to remove his property from the leased premises, but was specifically denied access to his property by Lone Butte, thereby causing a conversion of Johnson's property by Lone Butte to the exclusive use, ownership and possession of Lone Butte.

38. At the time of such conversion by Lone Butte, Johnson's property had a value of $2,000,000.

39. Lone Butte has failed and refused to compensate Johnson for the conversion of his property.

WHEREFORE, plaintiff, Bruce Johnson prays for a judgment and decree of this Court as follows:

1. A judgment against both defendants adjudicating that the Tribal Court judgment against Johnson is void for lack of personal jurisdiction over Johnson by the Tribal Court, and

2. A judgment against defendant, Gila River Indian Community in the sum of $2,660,000:

a) to compensate Johnson for the violation of his right to due process under 25 USC Section 1302 (8), and/or

b) to compensate Johnson for the taking of his property without just compensation in violation of 25 USC (5), and

3. A decree against defendant, Lone Butte Industrial Development Corporation enjoining any attempt to enforce the Tribal Court judgment against Johnson, and

4. A judgment against defendant, Lone Butte Industrial Development Corporation in the sum of $2,000,000 plus interest thereon from the date of the conversion of Johnson's property, plus costs and disbursements incurred herein, and

5. For such other and further relief as the Court may deem just and equitable.

/s/ Richard J. Sundberg

Richard J. Sundberg
Attorney at Law
(MN Attorney Reg. # 107244)
11025 Irwin Avenue South
Bloomington, MN 55437
(612) 888-1648 Phone

Supreme Court, U.S.
FILED
AUG 25 1999
OFFICE OF THE CLERK

No. 99-162

In The

Supreme Court of the United States

BRUCE JOHNSON,

Petitioner,

v.

GILA RIVER INDIAN COMMUNITY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF THE GILA RIVER INDIAN COMMUNITY

RODNEY B. LEWIS
General Counsel
(*Counsel of Record*)
Gila River Indian Community
P.O. Box 97
Sacaton, Arizona 85247
520-562-6200

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the District Court's dismissal of petitioner's claims against the Gila River Indian Community (the "Community") pursuant to 28 U.S.C. Section 1331 was improper and whether the District Court's decision was erroneously upheld by the Ninth Circuit Court of Appeals.

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

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STATEMENT OF THE CASE

Petitioner seeks this Court's review of whether his claim against the Community was improperly dismissed by both the District Court and the Ninth Circuit Court of Appeals. The Community, a federally recognized tribe, will demonstrate that the petition presented this Court misrepresents certain key facts underlying this matter and that no cause supports this Court's review of the petitioner's contentions.

The Community, which is comprised of the Pima and Maricopa tribes of Indians, is governed by Constitution and By-laws (1960) adopted pursuant to 25 U.S.C. Section 476. The Community's reservation, located in central Arizona and bounded by the greater Phoenix metropolitan area, was established under the Act of February 28, 1859, Ch. 66, 11 State. 388, 401 (the "Reservation").

Petitioner claims that federal court jurisdiction in this matter is properly founded in the Indian Civil Rights Act. 25 U.S.C. Section 1302. However, in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1977), this Court held that Indian tribes possess common law immunity from suit and no provision of the Indian Civil Rights Act permits this suit against the Community in federal court. Accordingly, the petitioner's claim that federal court jurisdiction is properly founded in the Indian Civil Rights Act was rejected by both the District Court and the Ninth Circuit Court of Appeals.

It is petitioner's further assertion that his action is one "arising under" federal law within the meaning of 28 U.S.C. Section 1331 and therefore properly within the District Court's jurisdiction. This complaint was rightly

dismissed by the lower courts because petitioner had failed to exhaust his remedies in the tribal judicial system, a requirement articulated in *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845 (1985).

Petitioner's Statement of the Case, Part A., "Facts Material to Consideration of Questions Presented," contains numerous errors, omissions, and misrepresentations. To set the record straight respondent Community has included in this Objection, the Findings of Fact, Conclusions of Law and Judgment of the Community Court signed by the judge of the Community Court dated September 28, 1995. App. A (attached).

In 1966, the Community and Lone Butte Industrial Development Corporation (the "Lone Butte") entered into a lease for land which is known as Lone Butte Industrial Park (the "Park"). App. A2. In 1979, Lone Butte and Genstar Conservation Systems, Inc. entered into a lease for the purpose of processing rubber. *Id.* In 1987, Tonson, a Minnesota corporation, acquired Genstar's business and purchased rubber reclamation equipment, machinery, and a rubber inventory consisting of tires and raw materials. App. A3. Tonson agreed to assume sole responsibility for removal of the waste tires from the leased premises. *Id.*

After analyzing a series of transactions, the court found that the petitioner was responsible for the liabilities of Tonson. App. A12. The Court further found that Tonson was merely the "alter ego" of Bruce Johnson and in fact found that the corporate veil of Tonson had been pierced and that Bruce Johnson was personally responsible for Tonson's liabilities. *Id.* The Court further found

that Bruce Johnson was the owner of the equipment which is the subject of this controversy. App. A13. The petitioner also had assumed responsibility for the removal of approximately one million tires from the premises leased from the Lone Butte. App. A12. The Court further found that the petitioner was responsible for the liabilities of Tonson. App. A12.

Petitioner continues his specious allegations that his efforts to exhaust his remedies in Tribal Court were futile, even though such contentions were heard and rejected by the District Court and the Court of Appeals for the Ninth Circuit. In point of fact, on April 15, 1999, an Order was issued by the Community Court setting forth a briefing schedule. On July 23, 1999, a hearing was held before the Community's Court of Appeals, a three-judge panel. A decision is pending in the matter. App. B.

REASONS FOR DENYING THE WRIT

The petitioner's claim that the District Court and the Ninth Circuit improperly dismissed his claim does not warrant review by this Court. The decisions below were very plainly a correct application of settled law, and no conflict among the circuits or with a state court of last resort is even alleged. Although the petitioner's Claim for Allowance of the Writ is confusing and difficult to understand, it appears that the entirety of his claim is based on Rule 10(c), Rules of the Supreme Court of the United States, that this matter involves a question of federal law that has not been, but should be, settled by this Court.

In *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845, 857 (1985), this Court demarcated the boundaries of tribal court jurisdiction, holding that 28 U.S.C. Section 1331 encompasses the federal question whether a tribal court has exceeded the lawful limits of its jurisdiction and that exhaustion in the tribal court is required before such a claim may be entertained by a federal court. Under *National Farmers*, the District Court's involvement in the resolution of petitioner's controversy is premature until such time as the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made. In *National Farmers*, the court stated:

> We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover, the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any questions concerning appropriate relief is addressed. *National Farmers Union Insurance Cos. v. Crow Tribe*, 856.

The petitioner asserts that *National Farmers* sets forth an exemption to the rule of exhaustion for which the decision is noted. The *National Farmers* Court, 856 Note 21, stated:

> We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith . . . or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

Petitioner's argument is based upon the flawed reasoning that a provision in the complaint filed in the District Court was based upon bias and prejudice and therefore fits within the "bad faith" exception contained in Note 21. First, the petitioner did not allege bad faith in his complaint and the bad faith alleged here is not sufficiently set forth in the Writ. In *National Farmers*, the Court quoted language from *Judice v. Vail*, 430 U.S. 327, 340 (1977) where the Court declined to intervene in state proceedings because there were no allegations specifically directed against the justices who had issued contempt orders. The bad faith exception, of course, must be construed narrowly and extraordinary circumstances must exist before intervention by the federal courts. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 612 (1975).

The Writ must be denied.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

RODNEY B. LEWIS
Attorney for the Respondent
P.O. Box 97
Sacaton, Arizona 85247
(520) 562-6200

APPENDIX A

IN THE GILA RIVER INDIAN COMMUNITY COURT
COUNTIES OF PINAL & MARICOPA
IN THE STATE OF ARIZONA

LONE BUTTE INDUSTRIAL DEVELOPMENT CORPORATION, a corporation chartered by the Gila River Indian Community, Plaintiff, v. INTERNATIONAL RUBBER, INC., a defunct Arizona Corporation, BRUCE JOHNSON, Defendants.	Case No. CV93-357SC FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT
BRUCE JOHNSON, Counter-claimant, v. LONE BUTTE INDUSTRIAL DEVELOPMENT CORPORATION, a corporation chartered by the Gila River Indian Community, Counter-defendant.	

The Court having heard the trial of this matter on January 16th and 17th, 1995, and having considered the post-trial briefs and response briefs submitted by the parties, hereby makes the following Findings of Fact and Conclusions of Law and issues the following Judgment:

FINDINGS OF FACT

1. On November 28, 1966, the Gila River Indian Community (the "GRIC") and Lone Butte Industrial Development Corporation, a corporation chartered by the GRIC ("Lone Butte"), entered into Lease No. B-GR-61 (the "Master Lease") relating to lands within the GRIC known as the Lone-Butte Industrial Park (the "Industrial Park").

2. On July 2, 1979, Lone Butte and Genstar Conservation Systems, Inc. ("Genstar") entered into Lease No. B-GR-61-T (the "Leased Premises"). Paragraph 8 of the Genstar Lease required Genstar to construct an improvement upon the Leased Premises with a value of at least $500,000.00. Genstar did in fact construct a metal building in which to conduct its business operations on the Leased Premises (the "Building").

3. Paragraph 4 of the Genstar Lease required Genstar to "use the Leased Premises to process discarded scrap rubber tires and other rubber materials," and expressly prohibited any change to this stated purpose without the prior written approval of Lone Butte and the GRIC.

4. Tonson, Inc., a Minnesota corporation ("Tonson"), was incorporated in December 1985. The two original shareholders of Tonson were Bruce Johnson and Milton LaPanta, who had formerly done business as Tonson Partnership. The assets of Tonson Partnership were transferred to Tonson, and Bruce Johnson and Milton LaPanta were each issued 750 shares of Tonson stock.

5. On May 11, 1987, Tonson acquired Genstar's ongoing business at the Leased Premises and the assets of

another rubber reclamation business in Chicago from GSX Polymers ("GSX") pursuant to a written agreement (the "Purchase Agreement"). The purchase price for the two businesses, a quantity of rubber reclamation equipment and other machinery (the "Equipment"), and a quantity of rubber inventory and raw materials was $675,000.00. The inventory and raw materials sold by GSX to Tonson included various quantities of tire chips, waste tires, crumb rubber, rubber buffings, "Penn Stock," and rubber peels.

6. Pursuant to the Purchase Agreement, GSX also transferred to Tonson its interest in the Genstar Lease and a Columbus-MacKinnon Tire Chipper machine then located in Vicksburg, Mississippi, to be transported to the Leased Premises at the expense of GSX.

7. Pursuant to Paragraph 2(c) of the Purchase Agreement, Tonson agreed to assume sole responsibility for eventual removal of the waste tires from the Leased Premises. At the time of the execution of the Purchase Agreement, there were approximately one million (1,000,000) waste tires stockpiled on the Leased Premises, which became the responsibility of Tonson.

8. Before Tonson entered into the Purchase Agreement with GSX, Bruce Johnson personally visited the Leased Premises for the purpose of deciding whether to loan the money for the acquisition to Tonson. Bruce Johnson did in fact loan the entirety of the purchase price to Tonson.

9. On May 14, 1987, Bruce Johnson, as the sole shareholder, called a special meeting of the shareholders of Tonson. During the meeting, it was agreed that Tonson

would enter into the Purchase Agreement with GSX, that Tonson would borrow the funds for the acquisition from Bruce Johnson, and that Tonson would give Bruce Johnson a security interest to secure repayment of the loan.

10. At the time that Tonson entered into the Purchase Agreement with GSX, the business at the Leased Premises lacked the equipment necessary to process whole waste tires, as required by Paragraph 4 of the Genstar Lease. The only materials that could be processed were tire buffings, tire peels, and Penn Stock, pure rubber products which did not contain any cord, metal, or fabric. This fact was known to both Bruce Johnson and Milton LaPanta at that time. However, if Tonson had received the Columbus-MacKinnon Tire Chipper machine, as stipulated by the Purchase Agreement, it would have been able to process whole waste tires.

11. On June 10, 1987, Bruce Johnson, as the sole shareholder, called another special meeting of the shareholders of Tonson. During the meeting, it was agreed that Tonson would grant Bruce Johnson "a security interest in and to all of the assets of the corporation located in Minnesota, Illinois and Arizona, including all machinery and equipment, inventory, accounts and notes receivable, and all leasehold and easement interests in real property, and all licenses and permits issued by public authorities in consideration for the sum of $648,973.21 loaned to the corporation by Bruce A. Johnson to acquire certain business and assets of GSX Polymers, Inc. located in Chicago, Illinois and Chandler, Arizona for the purpose of securing the repayment to Bruce A. Johnson of such loan."

12. Also on June 10, 1987, Bruce Johnson, as the secured party, and Milton LaPanta, as president of Tonson, as debtor, executed a security agreement (the "Security Agreement"), whereby Tonson, in exchange for a loan of $770,000.00 from Bruce Johnson, granted Bruce Johnson a security interest in certain property, including approximately one million (1,000,000) waste tires located on the Leased Premises acquired by Tonson from GSX pursuant to the Purchase Agreement.

13. On July 28, 1989, Bruce Johnson called a special meeting of shareholders of Tonson, at which he announced "that he was taking possession of all assets of the corporation secured to him by the Security Agreement dated June 10, 1987 executed by the corporation in his favor." The meeting minutes indicate that among the reasons for Bruce Johnson's foreclosure was the fact that the State of Minnesota "was seeking reimbursement from the corporation for costs the [Minnesota] Pollution Control Agency and the City of Andover [Minnesota] had incurred in extinguishing the fire that occurred at the Andover Dump last February [1989]." The minutes also state that Bruce Johnson "announced that he would seek a buyer of the assets of which he was taking possession, and that pending such a sale, he would allow the corporation to lease the equipment and occupy the Arizona premises, and act as his collection agent to collect the accounts receivable."

14. As a result of the July 28, 1989 foreclosure, Bruce Johnson became the owner of all property of Tonson located in Minnesota, Illinois, and Arizona, including the approximately one million (1,000,000) waste tires located on the Leased Premises and Tonson's leasehold interest

under the Genstar Lease. As the lessee under the Genstar Lease, Bruce Johnson assumed the obligation to leave the Leased Premises "in a clean and orderly condition" upon expiration or termination of the lease term, as provided by Paragraph 8(C) of the Genstar Lease.

15. On August 1, 1989, Bruce Johnson, as Lessor, and Tonson, as Lessee, entered into a written lease agreement whereby Bruce Johnson leased the Equipment to Tonson (the "August 1989 Equipment Lease").

16. Thereafter, on October 2, 1989 and October 3, 1989, Tonson caused identical financing statements to be filed with the Arizona Secretary of State and recorded with the Maricopa County Recorder, respectively. The financing statements covered: "All machinery, equipment, fixtures, processed and unprocessed rubber and inventory situated on the premises located at 6733 West Willis Road in the Lone Bute [sic] Industrial Park on Pima Indian property in Chandler, Arizona, including, but no limited to, those items listed on the attached list.

17. Tonson conducted business operations at the Leased Premises through March 31, 1990, and made rental payments directly to Lone Butte under the Genstar Lease. The fifth annual meeting of shareholders of Tonson, Inc. was held on February 15, 1990. During the meeting, Bruce Johnson, as the sole shareholder, announced that he was terminating the operations of Tonson effective March 31, 1990.

18. The Leased Premises was next occupied by Milton LaPanta, d/b/a/ International Rubber, which was incorporated as International Rubber, Inc. ("International Rubber"), and Arizona corporation, on May 23, 1990. By a

lease agreement dated April 11, 1990, Bruce Johnson leased the Equipment to International Rubber (the "April 1990 Equipment Lease").

19. Tonson, International Rubber, and Milton LaPanta made rental payments to Bruce Johnson under the August 1989 and April 1990 Equipment Leases in the form of promissory notes. The promissory notes are dated up through the Spring of 1994.

20. Beginning in early 1991, Lone Butte stopped receiving the rental and other payments due under the Genstar Lease. As a result, Lone Butte terminated the Genstar Lease on March 1, 1991.

21. Upon the termination of the Genstar Lease, title to the Building automatically vested in Lone Butte by operation of Paragraph 8(C) of the Genstar Lease. However, title to all "removable personal property" situated on the Leased Premises remained with the lessee, pursuant to Paragraph 8(C) of the Genstar Lease. Paragraph 1(F) of the Genstar Lease defines "removable personal property" as including "all furniture, fixtures, trade fixtures and equipment which is placed upon or used in conjunction with the premises by Lessee affixed to the buildings, improvements or land and includes by way of illustration but not of limitation that set forth on Exhibit "A" attached hereto." This definition encompasses the Equipment, but not the Building which was an "improvement" which became the property of Lone Butte upon termination. Exhibit "A" to the Genstar Lease does not list the Building.

22. On June 3, 1991, Lone Butte and International Rubber entered into Lease No. B-GR-61-TT (the "International Rubber Lease"), whereby Lone Butte subleased to International Rubber the Leased Premises. At the insistence of Milton LaPanta, copies of the Security Agreement and the April 1990 Equipment Lease were attached as exhibits to the International Rubber Lease, for the purpose of providing Lone Butte with notice of Bruce Johnson's claimed ownership of the Equipment, as an encumbrancer.

23. International Rubber failed to pay for land, water, and security for a period of four months from November 1991 through March 1992, resulting in an amount due to Lone Butte of $17,007.75. The International Rubber Lease required International Rubber to eliminate the waste tires from the Leased Premises by shipping two (2) tractor trailer loads of tires (approximately 3,000 tires) per week until completely depleted. The Lease authorized Lone Butte to assess a penalty of $1,500.00 against International Rubber for each failure to ship two (2) truck loads per week. International Rubber failed to ship the waste tires as required by the Lease and was assessed a penalty of $37,500.00 by Lone Butte.

24. A fire occurred at the Leased Premises on February 19, 1992, which caused damage to the Building and the Equipment. On March 3, 1992, Lone Butte locked up of the Leased Premises and has restricted and continues to restrict access to the Leased Premises. Lone Butte terminated the International Rubber Lease on April 3, 1992. International Rubber failed to remove the waste tires from the Leased Premises and otherwise leave the

premises in a clean and orderly condition as required by the International Rubber Lease.

25. On May 3, 1992. Lone Butte notified International Rubber that Lone Butte retained possession and claimed a lien (the "Landlord's Lien") for payment of rent in the amount of $17,007.75 and penalty assessment in the amount of $37,500.00. By letter dated June 3, 1992, Lone Butte provided Bruce Johnson with notice that the International Rubber Lease had been terminated and notice of the Landlord's Lien. In this letter, Lone's Butte counsel, Michael P. Upshaw, asked Bruce Johnson to supply evidence of rental payments made by International Rubber under the April 1990 Equipment Lease. By letter dated June 10, 1992, Gary Nelson requested International Rubber's counsel, Philip C. Tower, to provide proof of Bruce Johnson's ownership interest in the Equipment and repeated the request for proof of lease payments. These requests for documentation were repeated in letters by Lone Butte's counsel dated July 20, 1992, October 22, 1992, and April 30, 1993. However, Bruce Johnson did not supply the requested information until after suit was filed.

26. By letter dated December 2, 1992, Bruce Johnson advised Gary Nelson that he would be coming to Arizona within the succeeding 30 to 45 days to make arrangments for removal of the Equipment and the Building from the Leased Premises. Bruce Johnson subsequently went to the Leased Premises for this purpose on January 13, 1993, but was denied access by Lone Butte.

27. On January 13, 1993, the Equipment located on the Leased Premises had a fair market value of

$150,000.00. This figure takes into account depreciation and damage to the Equipment caused by the February 19, 1992 fire.

28. The cost of removing and properly disposing of the approximately one million (1,000,000) waste tires stockpiled on the Leased Premises is $675,000.00.

29. As a consequence of the continued presence of the approximately one million (1,000,000) waste tires on the Leased Premises, Lone Butte has lost rentals of $160,000.00.

30. Before Tonson entered into the Purchase Agreement with GSX Polymers in 1987, it was involved as a guarantor with a waste tire processing business and associated waste tire dump in Andover, Minnesota operated by Waste Recycling, Inc., a corporation owned by Milton LaPanta. As evidenced by the Second Amemded Complaint filed by the Minnesota Attorney General's Office in the matter of State of Minnesota, et al. v. Milton J. LaPanta, Waste Recycling, Inc., and Tonson, Inc., Case No. C6-88-9640, State of Minnesota Tenth Judicial District, the Minnesota Pollution Control Agency issued a "Request for Abatement Action" to LaPanta, Waste Recycling, and Tonson for either surrender or removal of the waste tires and a guarantee in January 1987. However, LaPanta, Waste Recycling, and Tonson did not fulfill their obligations under the stipulation, and a series of fires occurred at the site in 1988 and 1989, in cluding a tire pile fire in February 1989 which burned for three days. It eventually became necessary for the State of Minnesota to take control of the site and cleanup the waste tire pile to

abate the public safety and environmental hazards presented by the waste tires.

CONCLUSIONS OF LAW

1. International Rubber failed to perform its obligations to Lone Butte under the International Rubber Lease and is indebted to Lone Butte as follow: (1) $17,007.75 for delinquent rental and other payments: (2) $37,500.00 in penalties assessed for failure to remove two truckloads of waste tires on a weekly basis; and (3) $675,000.00 for the cost of removing the approximately one million (1,000,000) waste tires from the Leased Premises.

2. Tonson assumed responsibility for removing the approximately one million (1,000,000) waste tires from the Leased Premises pursuant to the Purchase Agreement. In addition, Tonson had a duty to remove the waste tires under the Genstar Lease.

3. Bruce Johnson is responsible for the liabilities of Tonson, including the corporation's obligation to remve the approximately one million (1,000,000) waste tires from the Leased Premises, under the principles of piercing the corporate veil. Tonson was merely the "alter ego" of Bruce Johnson. At the times relevant to this litigation, Bruce Johnson was the sole shareholder of Tonson, and was personally involved in and funded Tonson's acquisition of the Genstar business at the Leased Premises pursuant to the Purchase Agreement. In addition, the minutes of the shareholder meetings for Tonson show that it was Bruce Johnson, the sole shareholder, not Milton LaPanta, the president and director, who made the major management decisions for Tonson and controlled

the corporation's destiny. Finally, the record shows that Bruce Johnson supplied substantially all of Tonson's funding, and that Bruce Johnson owned most, if not all, of the corporation's operating assets. It is appropriate to pierce the corporate veil under these circumstances and hold Bruce Johnson accountable for Tonson's liabilities.

4. The Security Agreement given by Tonson to Bruce Johnson encompassed the approximately one million (1,000,000) waste tires acquired by Tonson pursuant to the Purchase Agreement. When Bruce Johnson foreclosed upon the Security Agreement in July 1989, he assumed title to all property of Tonson located in Minnesota, Illinois, and Arizona, including the waste tires. Accordingly, Bruce Johnson is the owner of and is responsible for the continued presence of the waste tires on the Leased Premises. The continued presence of the waste tires on the Leased Premises constitutes a nuisance and a continuing trespass, and Bruce Johnson has been unjustly enriched thereby.

5. Bruce Johnson is the owner of the Equipment. However, Lone Butte is the owner of the Building. Title to the Building automatically vested in Lone Butte in March 1991, when the Genstar Lease was terminated. The Building was an "improvement," not "removable personal property" under the Genstar Lease and pursuant to Paragraph 8(C) of that Lease became the property of Lone Butte when the Lease terminated. This conclusion is also compelled by 25 C.F.R. Sec. 162.9, which provides as follows: "Improvements placed on the leased land shall become the property of the lessor unless specifically excepted therefrom under the terms of the lease." There

is no provision in the Genstar Lease which specifically excepts the Building from Paragraph 8(C).

6. Lone Butte never acknowledged Bruce Johnson as the owner of either the Equipment or the Building. The fact that copies of the Security Agreement and the April 1990 Equipment Lease were attached as exhibits to the International Rubber Lease put Lone Butte on notice of Bruce Johnson's ownership claim. Following the fire and the lock-up of the Leased Premises and the termination of the International Rubber Lease, Lone Butte questioned Bruce Johnson's claim by repeatedly requesting documentary proof of both his title and rental payments made by International Rubber under the April 1990 Equipment Lease. Lone Butte's conduct was reasonable under the circumstances.

7. Bruce Johnson is barred from claiming that Lone Butte converted the Equipment when it denied him access to the Leased Premises on January 13, 1993, because at that time Bruce Johnson did not have the right to immediate possession of the Equipment. The April 1990 Equipment Lease was still in effect in January 1993, because Milton LaPanta and CV93-CV93-International Rubber were still making rental payments to Bruce Johnson in the form of promissory notes at that time. Moreover, Lone Butte's conduct in any event did not constitute a conversion of the Equipment, because Lone Butte reasonably questioned Bruce Johnson's ownership claim and was merely safeguarding and preserving the property pending resolution of the ownership issue.

8. The facts of this case show that Bruce Johnson consciously pursued a course of conduct with respect to

the approximately one million (1,000,000) waste tires stockpiled on the Leased Premises knowing that the tires created a substantial risk of significant harm to others. Bruce Johnson was well aware of the public safety and environmental hazards posed by waste tire piles when he funded Tonson's acquisition of the ongoing business at the Leased Premises from GSX Polymers pursuant to the Purchase Agreement, as evidenced by the problems experienced at that time and subsequently by Tonson and Milton LaPanta in Andover, Minnesota. Accordingly, an award of punitive damages against Bruce Johnson is appropriate.

JUDGMENT

Upon the foregoing Findings of Fact and Conclusions of Law, the Court hereby enters the following Judgment:

1. Judgment in favor of Lone Butte Industrial Development Corporation against International Rubber, Inc. on the First Claim for Relief as set forth by the First Amended Complaint for $729,507.75.

2. Judgment in favor of Bruce Johnson on the Second Claim for Relief as set forth by the First Amended Complaint, to-wit, that Bruce Johnson is the owner of the Equipment.

3. Judgment in favor of Lone Butte Industrial Development Corporation against Bruce Johnson for $160,000.00 for lost rental on the Third, Fourth, and Fifth Claims for Relief as set forth in the First Amended Complaint for trespass, nuisance, and unjust enrichment, respectively.

4. Judgment for Lone Butte Industrial Development Corporation against Bruce Johnson for $500,000.00 in punitive damages.

5. Judgment for Lone Butte Industrial Development Corporation on Bruce Johnson's Counterclaim for conversion.

6. Bruce Johnson shall remove all of the waste tires from the Leased Premises within 60 days of the entry of this Judgment and Order. Thereafter, Lone Butte shall permit Bruce Johnson to remove the Equipment from the Leased Premises.

7. If Bruce Johnson fails to remove all of the waste tires from the Leased Premises within the 60-day period, Lone Butte may auction the Equipment and apply the proceeds to first cover any costs incurred in conducting the auction and second to fund the removal of the waste tires from the Leased Premises. Lone Butte shall provide Bruce Johnson with written notice of the auction at least fifteen business days in advance of the auction. If the net proceeds of the auction are insufficient to cover the full cost of removing the waste tires, a judgment for the deficiency shall be entered against Bruce Johnson upon application to the Court. If there are any funds remaining following the deduction for auction expenses and removing all of the waste tires from the Leased Premises, the surplus shall be refunded to Bruce Johnson within seven business days.

8. The parties shall each bear their respective attorneys fees and costs of suit.

9. All monies awarded hereunder shall bear interest at 10% per annum until paid.

DATED this 28th day of September 1995.

/s/ Hon. Dallas De Lowe
Dallas De Lowe
Presiding Judge

APPENDIX B

IN THE COURT OF APPEALS OF THE GILA RIVER INDIAN COMMUNITY

LONE BUTTE INDUSTRIAL DEVELOPMENT CORPORATION, a corporation chartered by the Gila River Indian Community, **Plaintiff-Appellee,** **v.** **INTERNATIONAL RUBBER, INC., a defunct Arizona Corporation, Bruce Johnson,** **Defendants-Appellants.**	**Order** **Case No. CV93-357SC**
BRUCE JOHNSON, **Counter-claimant-Appellant,** **v.** **LONE BUTTE INDUSTRIAL DEVELOPMENT CORPORATION, a corporation chartered by the Gila River Indian Community,** **Counter-defendant-Appellee.**	

Appellant Bruce Johnson filed a Notice of Appeal in this matter on October 23, 1995 and on November 14,

1995, filed a Petition For Appeal and Notice of Appeal From Findings of Fact, Conclusions of Law and Judgment Dated September 28, 1995.

The Court, having considered this matter at a March 27, 1999 hearing; therefore,

IT IS ORDERED That the *GRIC Rules of Appellate Procedure* govern this appeal. *See GRIC Courts and Procedures*, § 1.201.

Section 1.201(D) of the *GRIC Rules of Appellate Procedure* provides in part that "[t]he appellate court shall review the permanent record of the trial court." *Id.* Therefore, the permanent record in this case will be reviewed for purposes of this appeal. The *Arizona Rules of Civil Appellate Procedure* may be used to govern matters of procedure where the *GRIC Rules of Appellate Procedure* are silent so long as they are consistent with tribal law and custom. *See GRIC Rules of Civil Procedure.* § 1.302 ("In deciding any matter that is not covered by the laws, ordinances or traditional customs and usages of the Community, or by applicable federal laws or regulations, the court shall be guided by the laws of the State of Arizona."). Because the *GRIC Rules of Appellate Procedure* do not provide specific directions governing the submission of briefs in civil appeals, Rules 12 - 15 of the *Arizona Rules of Civil Appellate Procedure* will govern the filing of briefs in this appeal except as otherwise provided by this Court.

ACCORDINGLY, IT IS ORDERED That appellant's brief shall be filed within forty (40) days after receipt of this order. Appellee's brief shall be filed within forty (40) days after service of the appellant's brief. The appellant

may file a reply brief within twenty (20) days after service of the appellee's brief, or the appellant may file a notice that no reply brief will be filed.

IT IS FURTHER ORDERED That five (5) copies of each brief shall be filed with the Sacaton Court Clerk.

IT IS FURTHER ORDERED That the briefs filed by the respective parties in this case address the following issues with supporting argument and cited legal authority:

1. What are the appropriate standards this Court should apply in reviewing the legal determinations and factual findings of the trial court?

2. Whether new evidence, not available to the trial court, should be considered on appeal.

3. What specific errors of law and/or erroneous factual findings, if any, did the trial court make?

IT IS FURTHER ORDERED That should either party in this matter elect not to file a brief in this matter, the party shall promptly notify the Court by letter stating the reasons why no brief is being filed.

DATED this 15th day of April, 1999
By Order of the GRIC Court of Appeals

/s/ William Thorne
WILLIAM A. THORNE, JR.,
Chief Judge

CERTIFICATE OF MAILING

I hereby certify that on this 15th day of April, 1999, I mailed a true and correct copy of the within instrument to:

Clerk of the Sacaton Court
Gila River Indian Community
P.O. Box 368
Sacaton, Arizona 85247

Richard J. Sundberg
Attorney at Law
11025 Irwin Avenue South
Bloomington, Minnesota 55437

Douglas A. Jorden
Law Offices of Jorden & Bischoff, P.L.C.
4201 North 24th Street, Suite 300
Phoenix, AZ 85016

/s/ Paul C. Echohawk
PAUL C. ECHOHAWK, ESQ.
Clerk of the GRIC Court
of Appeals